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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1932

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The respondent asserts that the only persons who could officially pass upon the admissibility of the alien here involved were the immigration officials at the port of arrival, and that therefore there was no way of its knowing or ascertaining at the time of embarkation whether the alien was admissible. We concede the premise of this argument but deny the conclusion. The facts with respect to the alien's claim to be a "temporary visitor" as disclosed by the investigation at Ellis Island (R. 8, 13) established clearly that the alien's claim was wholly

unwarranted. Had any inquiry as to the alien's status been made by the respondent at the time of embarkation it would have undoubtedly discovered that the alien was not a temporary visitor and therefore that he was inadmissible.

But the respondent contends that the alien had a "right" to have his status determined by immigration officials in the United States, and that therefore it could not be penalized for bringing the alien to the United States in order to assert that right. This argument assumes the very question at issue. While any alien who manages to reach this country unquestionably possesses the privilege of having the local immigration officials pass upon his admissibility, we know of no statute or regulation, and none is cited by the respondent, which provides that any alien such as the one involved in the instant case may be brought to this country for the purpose of having his claim to admission passed upon by the local immigration officials. Whether an alien has a "right" to come to this country to present his claim for admission depends, we submit, upon whether a steamship company may lawfully bring him to this country. Whether, so far as the case at bar is concerned, a steamship company may lawfully bring the alien to this country turns upon Section 6 of the Quota Act, which provides:

> That it shall be unlawful * * * to bring to the United States * * * any alien

> not admissible under the terms of this Act or regulations made thereunder * * *.

Since the alien here involved was "not admissible" under the statute, it was "unlawful" to bring him to this country. There would thus seem to be no basis for the assertion that the alien had a "right" to come here, and *a fortiori* no basis for the assertion that the respondent had the right to transport him.

The respondent relies, as did the court below, upon the earlier decision of the court below in *Compagnie Francaise de Navigation a Vapeur* v. *Elting*, 19 F. (2d) 773 (C. C. A. 2d), a case which also involved Section 6 of the Quota Act, and in which recovery of a fine imposed by the Secretary of Labor under that Section was allowed. We question the correctness of the decision in the *Compagnie Francaise* case since, as in its decision in the case at bar, the court failed to perceive the distinction made by Section 6 between the *imposition* of the fine and its *remission*. But assuming the decision in the case cited to be sound, it is distinguishable from the instant case. There the alien, who held a consular visa, had previously resided in the United States, and claimed to be returning to an unrelinquished domicile. He was admissible as of right if he could rebut the administrative presumption that his domicile had been relinquished by reason of an absence of more than six months. Under the then applicable immigration regulations, the existence

of his former status having been established, he was entitled to present proof on the disputed issue of abandonment to the proper immigration officials. As no such officials were available in the country of embarkation, the court held that he was entitled, *under the statute and regulations,* to appear in this country to present his claim for admission, and that by bringing the alien to this country under those circumstances the steamship company did not violate the law, notwithstanding that the alien was eventually found to be inadmissible. In the instant case the alien never possessed a status which exempted him from the restrictions of the quota and nothing in the statute or regulations conferred upon him the right to come to this country to present his claim for admission. In the *Compagnie Francaise* case [1] the right was founded upon an express provision of the immigration rules.

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[1] Because of what we believe to have been a faulty approach to the interpretation of the statute, the decision in the *Compagnie Francaise* case seems to have been misapplied in certain District Court decisions. Thus, in *Bermuda & West Indies S. S. Co.* v. *Elting*, 45 F. (2d) 411 (S. D. N. Y.), it was applied to aliens, possessing nonquota visas, who had never been domiciled in the United States, and recovery of fines imposed against the steamship company was allowed on the ground that the "only proper place to determine the correct facts * * * was at New York." See also *Transatlantica Italiana* v. *Elting*, 58 F. (2d) 769 (S. D. N. Y.). If these decisions hold that there can be no liability for a fine where the admissibility of the alien can not be known with certainty until that question has been passed upon by the local immigration officials, they are in conflict with *North German Lloyd* v. *Elting*, 48 F. (2d) 547, *infra*, and, we submit, are wrong.

That the *Compagnie Francaise* case is to be supported only upon the grounds above set forth, and that it does not lay down a general rule that a fine may not be imposed under Section 6 of the Quota Act for bringing to the United States an alien who is inadmissible but whose inadmissibility can not be determined with certainty until he reaches the United States, is apparent, we believe, from the same court's decision in *North German Lloyd* v. *Elting,* 48 F. (2d) 547. That case involved Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 145), which declares that it shall be unlawful for any person to bring to the United States any alien afflicted with a mental or physical defect which may affect his ability to earn a living, and provides for the payment of a penalty "if it shall appear to the satisfaction of the Secretary of Labor * * * that the existence of such * * * defect might have been detected by means of a competent medical examination" at the time of embarkation. Under this statute the steamship company is required not only to determine the medical question whether there is a defect, but also the further question whether the defect is such that it may affect the alien's ability to earn a living. The latter question is one which depends largely upon the view which the local immigration officials may take of the particular defect and individual in question, and therefore is one which can not be definitely determined

prior to embarkation any more easily than the question, arising under the Quota Act, whether an alien intends to come to the United States "temporarily for business or pleasure."[2] In other words, in that case, as in the case at bar, the admissibility of the alien could not be determined with certainty until his arrival in the United States, but neither that fact, nor the fact that the alien had been issued a consular nonquota visa, was held sufficient to relieve the steamship company from liability for a fine when, upon arrival, the alien was held to be inadmissible, the Secretary having found that the excluding defect could have been discovered by means of a competent medical examination.

Although not cited by the court below, the respondent relies upon *Dollar S. S. Line* v. *Hyde,* 23 F. (2d) 911 (C. C. A. 9th). In that case, which did not involve Section 6 of the Quota Act,[3] the court allowed recovery of a fine imposed under Section 9 of the Immigration Act of 1917, as amended, for bringing to the United States a diseased alien. The alien in question had lived in Hawaii for eighteen years and was returning, with a permit to reenter the country, from an absence of three

[2] Moreover, in *North German Lloyd* v. *Elting*, *supra*, the Secretary of Labor possessed the discretionary power, under Section 21 of the 1924 Act (U. S. C., Title 8, Sec. 158), to admit the alien under bond. As to this factor, compare *Dollar S. S. Line* v. *Hyde*, 23 F. (2d) 911 (C. C. A. 9th), *infra*.

[3] The attention of the Court is called to the distinction between Section 6 of the Quota Act and Section 9 of the Immigration Act of 1917, as set forth in footnote 11, p. 26, in the petitioner's main brief in the instant case.

months in Japan. Section 3 of the 1917 Act provides that—

> * * * aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.

Section 9 contains a proviso (U. S. C., Title 8, Sec. 145) that nothing in that section—

> * * * shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to section 3 of this Act exempted from the excluding provisions of said section.

The court held that the alien was one who was exempted by Section 3 from the excluding provisions of that section, and that, therefore, under the proviso to Section 9, a steamship company did not incur any liability for bringing such an alien to this country, even though upon arrival he was excluded. Assuming that the decision in the *Dollar S. S. Line* case is sound, which we doubt, it is clearly inapplicable to the statute involved in the instant case.

We believe, as stated by Judge L. Hand in his dissenting opinion (R. 21), that the facts in *North German Lloyd* v. *Elting,* 48 F. (2d) 547, *supra,* are "indistinguishable from those at bar," and that in applying the rule of the *Compagnie Francaise* case to the instant case the majority of the court below failed to perceive that the former case can only be

supported as an exception to the general rule which, when applied to the instant case, destroys the general rule entirely.

In addition to being inconsistent with the *North German Lloyd* case (48 F. (2d) 547), the decision of the court below in the instant case is in direct conflict with *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y.) and *New York & Porto Rico S. S. Co.* v. *United States,* 52 F. (2d) 980 (S. D. N. Y.), which cases arose under Section 16 of the Immigration Act of 1924.[4] Cf. *United States* v. *Compagnie Generale Transatlantique,* 26 F. (2d) 195 (C. C. A. 2d). It is apparently in conflict with *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting,* 55 F. (2d) 1048 (C. C. A. 2d), No. 48, present term, to be argued immediately after the instant case. See also *Navigazione Libera Triestina* v. *United States,* 36 F. (2d) 631 (C. C. A. 9th); *Denholm Shipping Co.* v. *Elting,* 55 F. (2d) 422 (S. D. N. Y.); and *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 55 F. (2d) 340 (S. D. N. Y.).

Respectfully submitted.

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[4] See footnote 3, p. 11, of the main brief for the petitioner in the instant case.

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